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No. 81-2275

IN THE

# SUPREME COURT

OF THE

UNITED STATES

OCTOBER, 1981

JOHN C. CARDIN,

*Petitioner,*

v.

JOSEPH B. DE LA CRUZ, THE HON. CAROL BURGETT, SANDY WELLS, OLIVER MASON, HAZEL OBI, JAMES HARP, GUY MCMINES, EARL BALLER, WAREN SHALE, MAX HUDSON, LAWRENCE HALL, PHILIP MARTIN, GERALD ELLIS, THE BUSINESS COMMITTEE OF THE QUINAULT INDIAN NATION, THE QUINAULT TRIBAL COURT,

*Respondents.*

## ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

## BRIEF OF AMICI CURIAE STATES OF WASHINGTON, ARIZONA, IDAHO, MONTANA, NEBRASKA, NORTH DAKOTA, UTAH AND WYOMING IN SUPPORT OF PETITION FOR CERTIORARI

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## QUESTIONS PRESENTED

I. In the absence of a treaty provision or federal statute conferring such power, does an Indian tribe possess the power to regulate a non-Indian's use of his own real property when such property is located within the exterior boundaries of the tribal reservation?

II. May a federal court properly find such power to exist in the absence of: (1) Any review and approval by the Secretary of Interior of the tribal ordinance exerting such power, and (2) Any factual finding by a federal court after an evidentiary hearing, that the conduct being regulated threatens or has a direct effect upon the political integrity, economic security, or health and welfare of the tribe?

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### STATEMENT OF INTEREST OF THE AMICI

In the State of Washington there are twenty-three Indian reservations, recognized as such by the United States government. Much of the land on these reservations has passed into non-Indian ownership, pursuant to the federal policy embodied in various allotment acts, particularly including the General Allotment Act of 1887

(24 Stat. 388). These non-Indian owners have established homes, farms and businesses on these lands.

In Washington, statewide, the non-Indian reservation population is approximately 58,000, while the Indian population is approximately 14,000. This ranges from the Port Madison Indian reservation, with roughly 3,000 non-Indians and about 50 Indians (see, *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978)), to the Quinault Reservation, where the instant case arose, which has very few resident non-Indians.[1] Similar conditions exist in the other Amici States.

Thus, the State's interest in this controversy is the important right of a major segment of its population to be free from the authority of a tribal government in which they can have no part.

## REASONS FOR GRANTING THE WRIT

### I. CONFUSION STEMMING FROM *MONTANA v. U.S.* and *MERRION v. JICARILLA APACHE TRIBE.*

Amici do not intend by this submission to reiterate or rehash the arguments already presented in the Petition. We attempt merely, and briefly, to point out what we see as two additional areas of confusion stemming from the juxtaposition of *Montana v. United States*, 450 U.S. 544 (1981) and *Merrion v. Jicarilla Apache Tribe*, ___ U.S. ___, 50 U.S.L.W. 4169 (January 25, 1982). It is of course, the Court of Appeals' misinterpretation of *Montana* and misapplication of *Merrion* which causes the problem, and produces Petitioner's request for plenary review by this Court.

A. *Merrion.*

The Court of Appeals' reliance on *Merrion v. Jicarilla Apache Tribe, supra*, is misplaced. In *Merrion*, it must be kept in mind, the non-Indian parties were carrying out their business not on their own property, as is the case with Mr. Cardin here, but rather on property

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[1] Although few non-Indians actually reside on the Quinault Reservation, even there fully 30% of the total reservation lands are owned by non-Indians.

owned by the tribe itself, or by the United States in trust for the tribe. The energy companies involved were severing the *tribe's* oil and gas from the *tribe's* property. They possessed no fee simple title to the property, including its mineral rights, derived from any patent issued pursuant to the General Allotment Act of 1887 (24 Stat. 388), as does Mr. Cardin here. *Merrion* thus does not even clearly tell us whether or not the tribal power there upheld extends to taxing a non-Indian, on non-Indian land, under circumstances where no business was being conducted with the tribe itself. Much less does it tell us whether or not that tribal power extends to regulating the activities of a non-Indian, on non-Indian land, where business, albeit conducted with individual tribal members, is not conducted with the tribe itself (see *Merrion, supra,* at 50 U.S.L.W. 4172.)

B. *Montana.*

The Court of Appeals' reliance upon *Montana v. United States, supra,* and particularly the *dictum* found at 450 U.S. 544, 565-566, is likewise misplaced. That case, and particularly that *dictum,* simply does not support the result reached by the Court of Appeals. Rather, we submit, it announces a test which, if applied to Mr. Cardin's situation here, should result in an absence of tribal jurisdiction over him and his property.

For ease of reference we will here repeat the language seized upon by the Court of Appeals from *Montana*:

> "* * * To be sure, Indian tribes retain inherent sovereign power to exercise some forms of civil jurisdiction over non-Indians on their reservations, even on non-Indian fee lands. A tribe may regulate, through taxation, licensing, or other means, the activities of nonmembers who enter consensual relationships with the tribe or its members, through commercial dealing, contracts, leases, or other arrangements. *Williams v. Lee,* 358 U.S. 217, 223; *Morris v. Hitchcock,* 194 U.S. 384; *Buster v. Wright,* 135 F.2d 947, 950 (CA8); see *Washington v. Confederated Tribes of the Colville Indian Reservation,* 447 U.S. 134 (1979). A tribe may also retain inherent power to exercise civil authority over

> the conduct of non-Indians on fee lands within its reservation when that conduct threatens or has some direct effect on the political integrity, the economic security, or the health or welfare of the tribe. See *Fisher v. District Court*, 424 U.S. 382, 386; *Williams v. Lee*, 358 U.S. 217, 220; *Montana Catholic Missions v. Missoula County*, 200 U.S. 118, 128-129; *Thomas v. Gay*, 169 U.S. 264, 273 (Footnote Omitted)."

The most telling portion of that *dictum*, a portion seemingly totally ignored by the Court of Appeals, is the citation of the four cases following the first sentence quoted above. Those cases present an important comparison and, we suggest, indicate that the Court did not intend to go beyond—and indeed actually intended to limit the exercise of tribal power to—the types of situations found therein.[3]

*Fisher v. District Court*, 424 U.S. 382 (1976) may present the most obvious situation where a tribe retains inherent power to exercise civil jurisdiction. That case, recall, involved a tribal court's jurisdiction over adoption proceedings. The nexus there is obvious. Adoption controls membership, the makeup of the tribe itself. What was at stake in *Fisher* was not only the integrity of the tribe, but ultimately its ability to control its continuing existence as an ethnic and cultural unit—neither is at stake here.

*Williams v. Lee*, 358 U.S. 217 (1959) likewise presents a very close nexus with the political integrity of the tribe itself. What was at stake there, of course, was the integrity and viability of the tribal court system. If a tribal member could be made an involuntary defendant in a state court, the tribe's ability to apply and enforce its own laws *to and against its own members* could indeed be severely restricted. What was crucial to the outcome of that case, we submit, was not the effect on the tribal member of being subjected to state court jurisdiction, but the harm *to the tribe itself* flowing from the dilution of its own court's power and jurisdiction over its own members. No such possible dilution exists here.

*Montana Catholic Missions v. Missoula County*, 200

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[3]Our assertion in this regard is bolstered by the Court's internal page citations to the opinions in each of the four cases.

U.S. 118 (1906); and *Thomas v. Gay*, 169 U.S. 264 (1898) provide the contrast, however. Both of those cases upheld the imposition of local or territorial personal property taxes to cattle grazing upon land within the exterior boundaries of the Flathead and Osage Indian Reservations. In both cases the tribes had granted grazing rights on the land involved. Here again the internal page references (200 U.S. 118, 128-129 and 169 U.S. 264, 273) are perhaps most enlightening. The Court in both cases rejected the challenge to the property tax in question because the impact of that tax upon the interests of the tribes involved, and the imposition of the tax upon that activity, was too "remote" to support tribal jurisdiction.

We suggest that the message from these two cases should be applied with the same force to the situation presented in the Petition. In order to support civil jurisdiction over a non-Indian, the tribal connection to the land or activities involved must be more than remote. Furthermore, that connection must be between the non-Indian land and activities and *the tribe itself*, and not simply with individual tribal members. Indeed, it may even be that the impact on the tribe itself, outside of the specific *Fisher* and *Williams* types of facts, must be so direct and the tribal nexus so close as to support exempting that land or activity from state taxation or jurisdiction, in order to support the assertion of tribal taxation or regulatory jurisdiction.

Amici submit, therefore, that the appropriate test to be applied in this area, one which seems to have been suggested, at least, by this Court in its *Montana dictum*, is this: Only when it is necessary to preserve the tribe as a unit, or necessary through control over non-Indians' conduct, may an Indian tribe possess civil jurisdiction to regulate non-Indian activity on non-Indian land. The question a tribe asserting such power must answer then is this:[3] Is it necessary to have jurisdiction over this non-

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[3]This question should be asked also by a federal court, in examining the validity of any assertion of jurisdiction, and by the Secretary of Interior before approving it (see *Merrion*, *supra*, 50 U.S.L.W. at 4172). Neither has taken place here. Thus Question Presented No. II.

member on his or her land, in order to preserve and effectuate our own jurisdiction over our own members, to enable us to preserve our integrity, economic security or welfare, *as a tribe, as a self-governing unit*? If the answer to that question is no, then the tribe possesses no regulatory power or civil jurisdiction over the non-Indian land and activities.

We submit then that in its *Montana dictum* this Court was actually approaching a test in this area very similar to that involved in *National League of Cities v. Usery*, 426 U.S. 833 (1976).[4] Indian tribes may exercise civil jurisdiction over non-Indians only when it is necessary to avoid impairing the tribes integrity, or their ability to function effectively *as a tribe*.[5]

## II. THE CONTROVERSY IS OF NATIONAL IMPORTANCE.

This dispute is not limited to an isolated reservation on Washington's Pacific Coast. Tribes elsewhere

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[4]We recognize and acknowledge the narrow application of *Usery* evidenced by recent cases. See *Hodel v. Virginia Surface Mining and Reclamation Ass'n*, 452 U.S. 264 (1981); *Federal Energy Regulatory Commission v. Mississippi*, ___ U.S. ___, 50 U.S.L.W. 4566 (June 1, 1982). But that simply highlights the appropriateness of the analogy with *Usery*. The Court there drew—quite narrowly—the lines beyond which Congress could not go in regulating the states as states. It did so in order to preserve the integrity and viability of states in our federal system. So too in *Montana*, just as in *Fisher* and *Williams*, the concern of the Court was the integrity and viability of another form of government; *i.e.*, tribal self-government, and the integrity of the tribe's own governmental power over its own members.

In *Usery* Congress ran afoul of the Tenth Amendment because it attempted to apply its powers, derived from the Commerce Clause, directly against the states, *as states*. The Tenth Amendment was found to be a shield against this intrusion upon the states' ability to function effectively in a federal system. The latter cases show, however, that it is not a sword. Likewise, we submit, here. The concept of tribal self-government should be correctly viewed as a shield, permitting tribes to possess and exercise, consistent with their dependent status (see *Oliphant v. Suquamish Tribe*, 435 U.S. 191 (1978); *McClanahan v. Arizona Tax Commission*, 411 U.S. 164, 171 (1973); *Montana, supra*, at 564.) only those powers necessary to function effectively *as a tribe*, but *not* as a sword, to pierce their dependent status and exercise, unfettered, general governmental powers over non-Indians.

[5]See also the Court's language in *Montana* found at 450 U.S. 564 and discussed at Pet., page 17, note 8.

throughout the country are asserting such civil regulatory power and jurisdiction over non-Indians within their reservations. To date, based we submit on the same improper interpretation of this Court's opinion in *Montana v. United States, supra,* and *Merrion v. Jicarilla Apache Tribe, supra,* the tribes appear to be succeeding. See, *e.g., Confederated Salish and Kootenai Tribes of the Flathead Reservation, Montana v. Namen,* ___ F.2d ___ (Ninth Cir., 1982), cert. pending under *Namen v. Confederated Salish and Kootenai Tribes of the Flathead Reservation,* No. 82-22; *Knight v. Shoshone and Arapahoe Tribes of the Wind River Reservation, Wyoming,* ___ F.2d ___ (Tenth Cir., 1982).

Indian tribes, non-Indian residents of their reservations, and the States in which those reservations exist, remain uncertain as to the extent of tribal civil regulatory powers and jurisdiction. That uncertainty will persist (in the absence of Congressional action) until this Court considers and announces the limitations of tribal powers in this area. Amici submit that this case, along with *Namen, supra,* presents an appropriate vehicle for such consideration by this Court.

## CONCLUSION

Certiorari should be granted and this case set down for plenary review. In the event that the Court likewise grants certiorari in *Namen,* amici suggest that the Court consider the appropriateness of hearing the cases in tandem.

DATED this 2nd day of August, 1982.

Respectfully submitted,

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